In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1487

MICHAEL DEMICHELE AND MARY P. DEMICHELE,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner[1] is a carpenter who regularly used his automobile to transport himself and his tools from home to his principal place of employment, and back again. The total mileage covered by petitioner during 1967, the year in question, was 17,793 miles. Petitioner deducted his automobile expenses in connection with this mileage from his adjusted gross income as an employee business expense. On audit, the Commissioner of Internal Revenue disallowed 29 percent of the claimed deduction (Pet. App. A 7-9).

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[1]References to petitioner are to Michael DeMichele. Mary P. DeMichele is a party only because a joint income tax return was filed for the year in issue.

The Commissioner's action was in accordance with *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (C.A. 2), which at the time was the governing rule in the Second Circuit. Under the *Sullivan* decision, a taxpayer was entitled to a deduction for expenses of carrying the tools of his trade back and forth to work. The Tax Court upheld the Commissioner's disallowance of 29 percent of the claimed deduction (Pet. App. A 7-10) and the court of appeals affirmed without opinion (Pet. App. B11).

After the decision of the Tax Court, but prior to the affirmance by the court of appeals, this Court announced its decision in *Fausner* v. *Commissioner*, 413 U.S. 838. In *Fausner*, the Court overruled the Second Circuit's decision in *Sullivan*, and held that a taxpayer cannot deduct his transportation expenses between his home and work, even if he carries necessary equipment, unless he can demonstrate that he incurred additional costs above his usual commuting expenses.

2. Despite this Court's explicit ruling in *Fausner* that commuting expenses are not deductible unless there is evidence of additional cost attributable to the transportation of tools, petitioner contends (Pet. 3) that the deduction of all commuting expenses is constitutionally mandated. Petitioner claims that the Sixteenth Amendment and decisional law proscribe the denial of commuting expenses as allowable deductions in arriving at income. But this court has held that (*New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440)--

> The power to tax income * * * is plain and extends to * * * gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

Since Congress has not provided a deduction for commuting expenses,[2] the court of appeals correctly upheld the Commissioner's disallowance of the claimed deduction.

Petitioner also asserts (Pet. 3-4) that this case conflicts with three other courts of appeals decisions. But this Court in *Fausner* not only overruled the Second Circuit's decision in *Sullivan*, but also rejected the Seventh Circuit's similar decision in *Tyne* v. *Commissioner*, 385 F. 2d 40, after remand, 409 F. 2d 485, certiorari denied, 396 U.S. 833, on remand, 29 T.C.M. 1398, affirmed, 468 F. 2d 913.[3] *Fausner* announced a uniform rule against

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[2]When the Internal Revenue Code of 1954 was enacted, Congress recognized that the expense incurred in commuting to and from work "constitute[d] a personal living expense and * * * [was] never deductible." H.Rep. No. 1337, 83d Cong., 2d Sess., p. A19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 169.

Indeed, since the enactment of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, commuting expenses have been considered nondeductible personal expenses. See S. 1048, 1 Cum. Bull. 101 (1919) Art. 101(a) of Treasury Regulations 62 (1921 Revenue Act); Art. 102 of Treasury Regulations 65 (1924 Revenue Act); Art. 102 of Treasury Regulations 69 (1926 Revenue Act); Art. 122 of Treasury Regulations 74 and 75 (1928 Revenue Act); Art. 122 of Treasury Regulations 77 (1932 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 86 (1934 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 94 (1936 Revenue Act); Art. 23(a)-2(*c*) of Treasury Regulations 101 (1938 Revenue Act); Sec. 19.23(a)-2(*c*) of Treasury Regulations 103 (1939 Code); Secs. 29.23(a)-2(*c*) and 29.23(a)-15(*b*) of Treasury Regulations 111 (1939 Code); Secs. 39.23(a)-2(i) and 39.23(a)-15(f) of Treasury Regulations 118 (1939 Code); Secs. 1.62-1(g), 1.162-2(e), 1.212-1(f), and 1.262-1(b)(5) of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.). See also *Sullivan* v. *Commissioner*, 1 B.T.A. 93.

[3]Nothing in *Crowther* v. *Commissioner*, 269 F.2d 292 (C.A. 9), supports petitioner's argument (Pet. 3). There, the only issue was the deductibility of transportation expenses to temporary work sites.

the deductibility of such transportation expenses.[4] The decision below, with respect to the disallowed expenses, is entirely consistent with *Fausner*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

In any event, the Ninth Circuit has at the least strictly limited *Crowther* to its facts, and possibly has overruled it. See, *e.g.*, *Sanders* v. *Commissioner*, 439 F.2d 296, certiorari denied, 404 U.S. 864.

[4]Since *Fausner*, the Court has denied certiorari in one case presenting this issue. *Coker* v. *Commissioner*, 480 F.2d 146 (C.A. 2), certiorari denied, January 7, 1974 (No. 73-636).